IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 168.

ELIZABETH S. OVERBY, LEONORA H. PACE, KATE CULBERSON, PAUL BLECKLEY, LOGAN BLECKLEY, AND HARALSON BLECKLEY, PLAINTIFFS IN ERROR,

vs.

FANNIE H. GORDON, DEFENDANT IN ERROR.

Now comes the defendant in error, Fannie H. Gordon, and moves the court to dismiss the writ of error in the above-entitled cause for want of jurisdiction, because the interests of the plaintiffs in error in respect of the judgment of the Court of Appeals of the District of Columbia, to which said writ of error was directed, are several, and the matter in dispute, exclusive of costs, as to no one of the said plaintiffs in error exceeds the sum or value of five thousand dollars.

HENRY E. DAVIS,
CHAS. COWLES TUCKER,
Attorneys for Fannie H. Gordon, Defendant in Error.

To SAMUEL F. PHILLIPS and FREDERIC D. MCKENNEY.

SIRS: Please take notice that at the hearing of the above-entitled cause the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the court thereon. Annexed hereto is a copy of our brief or argument in support of said motion.

HENRY E. DAVIS,
CHAS. COWLES TUCKER,
Attorneys for Fannie H. Gordon, Defendant in Error.

Brief or Argument in Support of the Foregoing Motion.

I.

STATEMENT OF THE CASE.

Hugh A. Haralson, late of the District of Columbia, deceased, died at Kirkwood, county of De Kalb, State of Georgia, on the 23d day of August, A. D. 1895, leaving surviving him, as his next of kin, the plaintiffs in error and the defendant in error as follows: (1) The plaintiff in error Elizabeth S. Overby, a sister; (2) the defendant in error, a sister; (3) the plaintiff in error Leonora H. Pace, a sister, and (4) the plaintiffs in error Kate Culberson, Paul Bleckley, Logan Bleckley, and Haralson Bleckley, the children of a deceased sister, Caroline C. Bleckley (Record, pp. 4–5).

The respective interests of the plaintiffs in error in the estate of the said decedent are accordingly as follows: Mrs. Overby, one-fourth; Mrs. Pace, one-fourth, and the remaining four, one-sixteenth each. The estate of the decedent did not exceed in value nine thousand two hundred dollars (Record, p. 11). The respective interests of the plaintiffs in error in the premises accordingly are not to exceed the following

sums: Mrs. Overby and Mrs. Pace, twenty-three hundred dollars each, and the remaining four plaintiffs in error not to exceed five hundred and seventy-five dollars each.

II.

ARGUMENT.

Manifestly, the interests of the several plaintiffs in error in the premises are separate, and under the repeated decisions of this court the writ of error should be accordingly dismissed. It is deemed necessary only to refer the court to the following cases, which, with the cases therein cited, set forth all of the court's adjudications on the point involved:

Henderson v. *Wadsworth*, 115 U. S., 264.
Gibson v. *Shufeldt*, 122 U. S., 27.
Clay v. *Field*, 138 U. S., 464.

The argument may be summarized in the following extract from the opinion of this court in the last-named case (pp. 479–480):

> "Many other cases stand in the same category, but they are referred to and commented on in the cases cited. The general principle observed in all is that, if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities *arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered*, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

And in *Gibson* v. *Shufeldt*, which is said by the court to be "exactly like *Stewart* v. *Dunham*" (115 U. S., 61), the court says (p. 39):

> "The sole matter in dispute, therefore, is between the defendant and *each* plaintiff as to the amount which the latter shall recover; and the motion to dismiss the appeal as to all the plaintiffs except the one whose debt exceeds $5,000 must be granted."

The Case on the Merits.

STATEMENT OF FACTS.

Hugh A. Haralson died in Kirkwood, De Kalb county, Georgia, August 23, 1895. On August 14, 1895, he executed a paper-writing purporting to be his last will and testament, by the terms of which he disposed of certain bonds of the value of about $9,000, the beneficiaries named in the will being his sister, Fannie H. Gordon, and his niece, Carrie Lewis Gordon. These bonds at the time of Haralson's death were on deposit in the city of Washington, D. C. The paper-writing purporting to be a will, having but one witness, was invalid as a will of personalty in the State of Georgia, but was valid as such a will in the District of Columbia.

On January 23, 1896, Fannie H. Gordon filed a petition in the supreme court of the District of Columbia, holding a special term for orphans' court business, praying for the admission of the paper-writing to probate and record as the last will and testament of Hugh A. Haralson and the granting of letters *cum testamento annexo* upon his estate.

On March 6, 1896, Elizabeth S. Overby and others, as next of kin of Hugh A. Haralson, other than Fannie H. Gordon, filed a caveat alleging that the paper-writing was not the last will and testament of the deceased, and that the deceased was not at the time of his death a resident of the District of Columbia, but a resident of the State of Georgia.

On April 10, 1896, issues were framed in the orphans court of the District of Columbia as follows:

> "1. Was the said deceased at the time of his death a resident of the District of Columbia?
> "2. Was the said deceased at the time of his death a citizen and resident of the State of Georgia?
> "3. Was the said deceased at the time of the making of the paper-writing purporting to be his last will and testament a resident of the District of Columbia?
> "4. Was the said deceased at the time of the making of the paper-writing purporting to be his last will and testament a citizen and resident of the State of Georgia?
> "5. At the time of his death did any considerable part of the personal estate of the said deceased lie within the District of Columbia?"

And these issues were certified for trial by jury.

In February, 1898, trial of these issues was had in the circuit court, and on February 10, 1898, the jury found that Hugh A. Haralson was a resident of the District of Columbia, and that at the time of his death a considerable part of his estate did lie therein.

In the course of the trial it developed that on April 6, 1896—one month after the filing of the caveat and four days before the framing of the issues in the probate proceedings in the District of Columbia—Logan Bleckley, one of the caveators, had filed a petition in the court of Ordinary for De Kalb county, Georgia, alleging that Hugh A. Haralson at the time of his death was a resident of Georgia, and praying for letters of administration upon his estate; and on May 4, 1896, twenty-eight days later, the last-named court passed an order appointing Logan Bleckley administrator of the estate.

At the same time was filed in that court a request on the part of the next of kin of the decedent, other than Fannie H. Gordon, for the appointment of Bleckley as administrator, and the husbands of two of the next of kin and one of the

next of kin signed Bleckley's administration bond as sureties.

There is nothing in the record of the proceedings in the trial in the supreme court of the District of Columbia to show that Fannie H. Gordon had any knowledge whatever of the proceedings in De Kalb county, Georgia; and there is nothing in the said proceedings to show that she had such knowledge: on the contrary, those proceedings show on their face that the order of appointment therein made was made upon notice by publication only (Rec. 11, *fol.* 12).

Although, as stated above, the estate which Hugh A. Haralson endeavored to bequeath by his will, at the time of his death and at the time of the filing by Mrs. Gordon of her petition in the orphans' court of the District of Columbia, lay in the District of Columbia, and was, therefore, then within the jurisdiction of that court, Logan Bleckley, after the filing of the caveat to which he was a party, and after the framing, at his and his co-caveators' instance, of the issues which were to determine the residence of the deceased, secured possession of the estate from its custodian in the District of Columbia, and removed it from the District of Columbia, claiming to act as administrator under grant of the letters issued by the Georgia court.

There is nothing to show that Mrs. Gordon or her representatives had any knowledge of this act of Bleckley in taking possession of the estate and removing it from this jurisdiction.

At the trial in the circuit court that court refused to admit in evidence certified transcripts of the record of the Georgia court, which were offered by the caveators to show that the question whether Hugh A. Haralson was a resident of the District of Columbia was *res judicata*: the court excluding them upon the ground that the proceedings in the Georgia court, instituted by the caveators at a time when proceedings to which they were also parties were pending in the orphans' court here, involving the identical question of

the residence of the decedent, were practically a fraud upon the latter court and should be disregarded by it. The opinion of the trial court (Mr. Justice Cole) is set out in an appendix to this brief.

The refusal of the court to admit this evidence forms the assignment of error here.

There was one other assignment of error in the Court of Appeals, namely, whether the trial court erred in assigning to the propounder of the will, Mrs. Gordon, the position of plaintiff in the trial, and to the caveatees the position o defendants, and at the same time ruling that the caveatee, as plaintiff, should lead in the introduction of proof and have the right to open and close to the jury. We discuss first the second question, namely:

I.

Did the Trial Court Err in Its Alignment of the Parties?

The defendant in error, in her petition for the probate of the will, alleged that the deceased at the time of his death *was a resident of the District of Columbia*, that the paper-writing she produced *was the will of the deceased*, and that *all of his estate except an insignificant part was in the District*.[1] The

[1]Act of Assembly of Md., 1798, ch. 101, subch. 2, sec. 5:

"Any will or codicil containing any disposition relative to goods, chattels, or personal estate, may be proved in the county where most of the witnesses reside, or in the county in which letters testamentary or of administration may be granted."

Id., ch. 101, subch. 5, sec. 2:

"Whenever any person hath died intestate, leaving in this State goods, chattels, or personal estate, letters of administration may be forthwith granted by the orphans' court of the county wherein was the party's mansion-house or residence; or in case he or she had no mansion or residence within the State, letters shall be granted in the county where the party died; and in case the party neither had mansion or residence, nor died within the State, letters may be granted in the county wherein lies, or is supposed to be, a considerable part of the party's personal estate."

plaintiffs in error in their caveat denied the allegation of residence, and also stated that the paper-writing was not the last will and testament of the deceased. The issues certified by the orphans' court were framed with a view of securing a determination of the two questions: (1) of the residence of the deceased, and (2) whether at the time of his death any considerable part of his estate lay in this District.

Plainly, therefore, the burden of proving affirmatively the allegations of her petition was on the defendant in error, before the orphans' court could admit the will to probate. Those allegations were denied by the plaintiffs in error as caveators. The *factum* of the will was in dispute. A careful examination of the Maryland cases cited by the plaintiffs in error on the argument below will disclose the fact that in most, if not all of them, the real issue between the parties was not as to the existence of the will, but as to its validity as a testamentary paper.

In the case of Yingling *vs.* Yingling, 16 Md., 112, an executor had presented a claim against the estate of his testator, and the distributees of the estate had contested the claim, alleging its invalidity. Issues were framed accordingly, and the Court of Appeals (p. 120) said:

> "In cases of this kind we think the party *propounding* the claim should appear as plaintiff in the trial of the issues. The party applying for the issues is not entitled to be plaintiff, though in one sense he may be considered an actor in the proceeding. Here the matter to be established is the appellee's claim against his testator. He could not sue himself, nor initiate proceedings with a view to issues at law. He did all that, in the first instance, the law requires; he proved his claim and offered it for allowance in his account as executor, and when contested he ought not to be deprived of the advantage of position which the burden of establishing the claim would give any other creditor of the estate. The cases referred to by the appellants do not apply as closely as their counsel contend they do. In

Brooke *vs.* Townshend, 7 Gill., 25, the *factum* of the will was not in issue. Conceding its existence, but denying its validity, the caveators assailed it, on the ground of want of capacity, &c. There was something on which they could commence their contest, and might well claim the opening and conclusion. In cases of justification pleaded, payment, &c. (Kearney *vs.* Gough, 5 G. & J., 457), the plaintiff opens by showing that his case is admitted by the pleadings of his adversary. But here, the claimant must commence, if the case proceeds at all, unless the appellants begin by admitting the *prima facie* proof of the demand, by reading the account and affidavit and its passage by the orphans' court, and then assume the burden of disproving it, a position we assume they would be unwilling to occupy. *The general rule is that the party holding the affirmative of the issue must take the burden of proof, and, under the circumstances in which the issue is presented here, the claimant ought to open and conclude.*"

It should be observed that there is no attestation clause to Haralson's will, and that, as the record shows, the defendant in error assumed the burden of proving its execution by the witness Macatee (p. 2), and did prove it by taking his deposition. And having alleged in her petition that deceased was a resident of the District, she was obliged to prove that jurisdictional fact. The plaintiffs in error in their caveat denied both the existence of the will and the jurisdictional fact. Can it be doubted that the orphans' court would have denied probate of the will unless both its execution and the residence of the decedent were proved?

It is a presumption of law that a testator when he makes his will is sane, and one who asserts to the contrary has the burden of proving his assertion. But it cannot be said that it is a presumption of law that the District of Columbia was the last residence of every testator whose will is there offered for probate. That is an affirmative matter which must be alleged and proved.

No case in this District can be found wherein this precise point has been adjudicated. It has long been the practice, however, in will contests, where the *factum* of the will is denied by the caveators, as distinguished from its invalidity upon the ground of fraud, insanity, undue influence, etc., to make the caveatee plaintiff, the burden of proving the will being upon him. So it was in the very recent case of Throckmorton *vs.* Holt, 12 App. D. C., 552. In that case there was no attestation clause to the will, and forgery was alleged. The caveatees were made plaintiffs and opened and closed to the jury. The caveators admitted, as will be seen from the opinion of the court, that the alignment of the parties, under the circumstances, was discretionary with the trial court.

But to cut short the discussion and dispose of this question, it is necessary only to quote the following language of this court in the case of Lancaster *vs.* Collins, 115 U. S., 222:

> "It is also assigned for error that the court refused to permit the counsel for the plaintiff to make the closing argument to the jury, the contention on the part of the plaintiff being that the affirmative was with him. But this is purely a question of practice, to be reviewed only by a motion for a new trial in the trial court, and is not the proper subject of a bill of exceptions or of a writ of error, because it does not affect the merits of the controversy."
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> Day *vs.* Woodworth, 13 How., 363, 370.
> See, also, Hall *vs.* Weare, 92 U. S., 728.

II.

Did the Trial Court Err in Its Refusal to Admit in Evidence the Record of the Georgia Court of Ordinary ?

As heretofore stated, the one object of the plaintiffs in error in offering this evidence was to show that the question whether Hugh A. Haralson was a resident of the District of Columbia at the time of his death was *res judicata*, and that the defendant in error was estopped to assert otherwise (R., p. 14).. The Georgia court's order of May 4, 1896, appointing Logan Bleckley administrator, recited that the decedent "died a resident of said county [De Kalb Co., Georgia], intestate," and, of course, if the determination of that question was binding on the courts of this District, under the circumstances, nothing would have been left for the lower court to do but to direct the jury to find that the decedent, at the time of his death, was not a resident of this District.

It is true that the Chief Justice of the Court of Appeals in his dissenting opinion (p. 27 of the Record) says—

> "that the transcript of the record of the Georgia court was offered by the caveators as tending to show that the deceased had died a resident of the said county of De Kalb, intestate, and that the caveatee was thereby estopped to deny these facts. But the court below rejected the record *in toto* and would not admit it for any purpose, and the caveators excepted. The only question, therefore, presented on this appeal is as to the admissibility of that record. * * * It may be that the effect attributed to the judicial proceeding in Georgia, in the offer made, was too broad and conclusive and I think it was so. But while the record may not operate as an estoppel on the question of domicile, it does not follow that it should have been rejected as furnishing no evidence whatever."

But we submit that the record of this case shows that the plaintiffs in error offered the Georgia record solely on the ground that it was an estoppel upon the defendant in error, and not simply as evidence tending to show that the decedent was domiciled in Georgia, to go to the jury for what it was worth. The ground of the objection of the defendant in error to its admissibility was that it was offered as an estoppel upon her, and the ruling of the trial justice, whose opinion is appended to this brief, shows clearly that the record was offered for no other purpose. The majority of the members of the Court of Appeals so understood the offer, for in their opinion they say (Record, pp. 19, 20): "We understand that they [the plaintiffs in error] rely upon the decree of the court of ordinary as a conclusive estoppel against the proceedings in this jurisdiction. The question, then, is whether that decree does operate as such an estoppel." There is nothing whatever in the opinion of the trial court or in the record of this case to show that the offer would have been rejected if it had been made for the purpose for the first time in the history of the case suggested by the Chief Justice. Indeed, the plaintiffs in error, at the top of page 20 of their brief, utter an emphatic protest against the suggestion of the Chief Justice that the Georgia record, although competent, was not conclusive as evidence of the facts found therein, and nowhere in their brief do they contend that the record was offered for any other purpose than to estop the defendant in error and to show that the question involved, namely, the domicile of the decedent, was *res judicata*. The plaintiffs in error do, on page 10 of their brief, intimate that the record may contain "an admission therein made by a party to such pending suit that is offered." If this means that the record should have been admitted in evidence as containing an admission on the part of the defendant in error, we say, first, that it was not offered for that purpose, but as an estoppel, and was resisted by the defendant in error, and

ruled out by the trial court solely on that ground, and, secondly, that no admission on the part of the defendant in error, express or constructive, could be evidence whether the deceased was or was not a resident of a particular place at the time of his death. No declarations, acts, or admissions on her part could bind the estate of the deceased or the beneficiaries named in the will, *of which she is but one.* Indeed, if she had in so many words declared that the deceased was a resident of Georgia at the time of his death, her statement would have involved a conclusion of law on her part, and would have been incompetent and inadmissible in evidence. Questions of residence and domicile of decedents are questions of law, to be determined from the acts, conduct, and declarations of the decedents and not from acts, conduct, or declarations of others.

The contention of the defendant in error is, first, that the supreme court of the District of Columbia, holding a special term for orphans' court business, having first taken cognizance of this cause, had the exclusive right to entertain and exercise such jurisdiction to the final determination of the cause, and, secondly, that the plaintiffs in error, having appeared in the cause and submitted to the jurisdiction of that court, perpetrated a fraud both upon that court and the Georgia court in subsequently raising in the latter court the precise question which was pending undetermined in the former court, and that the rule of comity between judicial tribunals was thus violated.

(*a.*) Upon the first proposition we cite—

Ex parte Chetwood, 165 U. S., 443.
Ex parte Rhodes, 48 La. Ann., 1363.
Craig v. *Hoge*, 95 Va., 275.
Ober v. *Gallagher*, 93 U. S., 199.
Merrill v. *Lake*, 16 Ohio St., 373.
Booth v. *Ableman*, 16 Wis., 460.
Ex parte Bushnell, 8 Ohio St., 599.
Clepper v. *State*, 4 Tex., 242.

Story's Eq., 64*k*.
Slyhoof v. *Fliteraft*, 1 Ashm., 171.
Taylor v. *Carryl*, 20 How., 583.
Peck v. *Jenness*, 7 How., 612.
Smith v. *M'Iver*, 9 Wheat., 532.
Peale v. *Phipps*, 14 How., 368.
Shelby v. *Bacon*, 10 How., 56.

(*b*.) Upon the second proposition, we ask the attention of court to the following cases:

Where a suit involving conflicting liens and mortgages on certain property is instituted in one court, and all persons in interest are made parties to the suit, the subsequent institution of another suit in a different court by two of the parties is a fraud on justice, and will not divest the former court of jurisdiction to determine all the issues between the parties, in respect of the mortgaged property, without regard to any changes in the title or possession of the property.

Barkdull v. *Herwig*, 30 La. Ann. (Part I), 618.

Where a court of general jurisdiction, and legally competent to determine its own jurisdiction, has acquired jurisdiction *de facto* over person or subject-matter, it is a rule, founded upon comity between judicial tribunals, that no court will interfere with or seek to arrest the action of the court in which and while the case is still pending and undetermined.

Ex parte Bushnell, 8 Ohio St., 599.

Where a petition has been filed by the proper parties before the board of county commissioners for the incorporation of a town, and the petition conforms to the requirements of the statute, it is the duty of the commissioners to hear the proofs, and, if satisfied that the requirements of the law have been complied with, to make an order declaring that the territory embraced in the petition shall, with the assent of the qualified voters thereof, be an incorporated town, by the name specified in the petition; and after the election has been properly certified by the inspectors of

the election, it is the duty of the commissioners to make an order declaring that such town has been incorporated by the name adopted.

The pendency of such a petition gives the county commissioners jurisdiction of the subject-matter thereof, and that jurisdiction cannot be ousted by the adverse action of the city council. Where there exist two tribunals, possessing concurrent jurisdiction of a subject-matter, the jurisdiction becomes exclusive in the one before which proceedings are first instituted.

Taylor v. *The City of Ft. Wayne et al.*, 47 Ind., 274.

While a petition of the mayor and aldermen of a city in which a railroad crossing is situated, and of the directors of the railroad corporation to the county commissioners for an alteration of the crossing, so as to allow the highway to pass under the railroad, is pending, the mayor and aldermen are not authorized to join with the common council in changing the grade of the highway at the same place, even with the consent of the railroad corporation. The jurisdiction of the county commissioners, having first attached to the subject of the alteration, necessarily excluded the jurisdiction of any other tribunal over the same subject until these proceedings were ended.

"*And*," says the court:

> "*That principle applies with peculiar force to this case, in which the mayor and aldermen, after joining with the directors of the railroad corporation in invoking the action of the county commissioners, have undertaken, with the assent of the same corporation, and the concurrence of the common council, to nullify and defeat by their own act the proceedings which they had set in motion.*"
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> *Powers* v. *City Council of Springfield*, 116 Mass., 84.

And also:

> "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause; and when the juris-

diction of the court and the right of the plaintiff to prosecute his suit has once attached, that right cannot be arrested or taken away by proceedings in another suit. These rules have their foundation not merely in comity but in necessity; for if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable for a process for contempt in one, if they dare to proceed in the other."

Peck v. *Jenness*, 7 How., 624, cited in *Taylor* v. *Carryl*, 20 How., 596.

"Filing by order of a Federal court of a bill for a receiver is sufficient to give priority of jurisdiction over the property as against a subsequent garnishment under process of a State court, although this was issued before service upon the defendant in the suit for a receiver, if a receiver was appointed in due time."

Rusner v. *Railroad Co.*, 89 Tex., 656.
Zimmerman v. *So Relk*, 80 Fed. R., 417.

"The county court of one county having full jurisdiction of the subject-matter and the person of a guardian and his wards, cannot be ousted of jurisdiction of a proceeding to compel such guardian to give a new bond, by the latter getting himself appointed guardian in another county."

Wackerle v. *People*, 168 Ill., 250 (48 N. E., 123), rev'g 65 Ill. App., 423.

"When two courts have concurrent jurisdiction over the same subject-matter, the court in which the suit is first commenced should be allowed to retain jurisdiction until the litigation is settled."

Jenkins v. *Simms*, 45 Md., 532.

"This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres and over the same subjects and persons. The only course of safety, therefore, is, when one court having jurisdiction over the subject, has possession of the case, for all others

with merely co-ordinate powers to abstain from any interference. Any other rule will unavoidably lead to perpetual collision and the production of the most calamitous results."

Brooks v. *Delaplaine*, 1 Md. Ch., 351.

On page 18 of the brief of the plaintiffs in error it is said:

"The orphans' court below has at no time had *possession*, either actual or constructive, of the assets of the decedent. If at the initiation of the caveat, or some other time, it had appointed an administrator *pendente lite* this might have been otherwise. But no application was made for such appointment, or for any other action looking to the taking charge of such assets.

"Accordingly, *Heidritter's case*, and the six others, referred to together upon page 22, top, of the record [in the majority opinion of the Court of Appeals] do not support the suggestion in that connection—of an improper interference by the court of ordinary in Georgia—or by parties litigant therein, with a *res* then in the custody of the orphans' court here. For in every one of those cases the *res* in question was in the possession of some receiver, marshal or other official of the court that had been interfered with."

We can best reply to this contention in the language of Judge Thayer in the well-considered case of *Merritt vs. American Steel Barge Co.*, 88 Fed. Rep., at page 31. In the opinion in that case, after pointing out that the doctrine is well settled that when a court, in the progress of a suit properly pending before it, takes possession of property by mesne or final process or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired; that the possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-

ordinate jurisdiction from exercising a like power, the court says:

> "The doctrine in question is not limited in its application to cases where property has *actually* been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation, the court *may* be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to Federal and State courts, being the outgrowth of necessity is 'a principle of right and of law' which leaves nothing to the discretion of a court, and may not be varied to suit the convenience of litigants" (*Gates vs. Bucki*, 12 U. S. App., 69; 4 C. C. A., 116, and 53 Fed., 961; *Chittenden vs. Brewster*, 2 Wall., 191; *Orton vs. Smith*, 18 How., 263, 265; *Union Trust Co. vs. Rockford, R. I. & St. L. R. Co.*, 6 Biss., 197; 24 Fed. Cas., 704; *Owens vs. Railroad Co.*, 20 Fed., 10; *Union Mut. Life Ins. Co. vs. University of Chicago*, 6 Fed., 443).

That the pendency of a suit strictly *in personam* has not the effect of preventing a party to that suit from bringing a suit in another jurisdiction involving the same issue, and from pleading the judgment there recovered as an estoppel in the former action, must be conceded, for the question has been so decided by this court in *Stanton vs. Embrey*, 93 U. S., 548 (cited by the plaintiffs in error), and in *Insurance Co. vs. Harris*, 97 U. S., 331; but if the prior action deals either actually or potentially with specific property or objects—is either a proceeding *in rem* or *quasi in rem*—the court first obtaining jurisdiction cannot be ousted of it by another

court. As Mr. Justice Miller, in *Buck vs. Colbrath*, 3 Wall., at page 345, says:

> "In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought and the identity of the parties in the different suits."

In that case it was held that an action of trespass against a United States marshal for taking goods does not come within the principle of *Freeman vs. Howe*, 24 How., 450, which decided that property held by a United States marshal under a writ of replevin from a Federal court could not be lawfully taken from his possession by any process issuing from a State court.

It would seem to be a useless consumption of space to argue and cite authorities in this brief to the effect that proceedings in an orphans' court to obtain letters testamentary or letters of administration are proceedings *in rem* and not *in personam*, especially as it is conceded by the plaintiffs in error that the estate of the decedent in this case, consisting of about $9,000 in stocks and bonds, was in the District of Columbia at the time that the petition for letters of administration *c. t. a.* was filed, at the time the plaintiffs in error filed their caveat, and at the time the issues were framed and certified for trial by jury. Indeed, the whole argument of the plaintiffs in error is based upon the initial proposition that the decree of the Georgia Court of Ordinary having been rendered in a proceeding *in rem* and not a proceeding *in personam*, is conclusive as against the world. This contention involves a distinct recognition of the fact that a proceeding to obtain letters of administration upon a decedent's estate is a proceeding *in rem*.

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APPENDIX.

Opinion of the Trial Court (Justice Cole) upon the Question of the Admissibility of the Record and Proceedings of the Georgia Court.

The COURT: This question is not without its difficulties. These questions are always difficult, especially in a case like this, which is a *quasi* proceeding *in rem*, affecting the estate of a decedent, and especially where that estate is within the jurisdiction of the court which first obtains jurisdiction. I think it is a violation of that principle of judicial comity for any other jurisdiction to attempt to forestall the action of this. The proceeding in Georgia, I think, was a violation of that principle of judicial comity, and I think if the Georgia court had been informed that this question was pending here, and that the property was within the jurisdiction of this court, and that the parties who applied for administration there had appeared in this court and raised the question here, it would not have proceeded in the matter, but would have said it would await the adjudication here. I am sure this court would have done that, and I think the Georgia court would have done it if it had been brought to its attention.

The real question here is whether this court has jurisdiction. That is the real question raised by the petitioner, and the caveatee, and by the issues framed here—whether this court has jurisdiction to appoint an administrator; that is the real question before this jury.

I cannot conceive that while that question is pending here, and this court is about to proceed to determine the question of whether it has jurisdiction to appoint an administrator, the Georgia court, if it had been aware of the

pendency of that question here, would have undertaken to decide that question for this court. That is what it has done, and if we should admit this record and give it the force and effect which is claimed for it under the Constitution, it would be the Georgia court coming in and determining, while this court had the matter under consideration, whether this court had jurisdiction to proceed or not. If I were going to hold that way I should want some controlling authority, and I do not see it, and my best judgment is that, under the circumstances, this case is distinguishable from the Gorman case for the reason that the party appointed administrator in a foreign jurisdiction was before this court at the time he was appointed and knew this proceeding, and ought not to have applied to the Georgia court, and I think the duty of this court is to reject that record on that ground—not on the ground that the Georgia court did not have jurisdiction—because I think under the decision of the Court of Appeals that decision would hold, and, going by that decision, I think I would be bound to hold that the Georgia court had jurisdiction to proceed. But I think we ought not to recognize its judgment in this case, because it would be substituting the duty of the Georgia court for this court upon the question of this court's jurisdiction.

I do not think that can be done. I think this court must go on and determine whether it has jurisdiction in this matter or not, and whether it has jurisdiction or not depends upon the question of fact as to whether Mr. Haralson was a resident of the District of Columbia or of Georgia when he died, and I think we must determine that question for ourselves.

I will therefore reject that record and allow an exception, and we will go to the jury with the question.